STATE OF MICHIGAN

IN THE SUPREME COURT

JEANNETTE GORDON,

Plaintiff-Appellant,

vs

HENRY FORD HEALTH SYSTEM,
Self-insured,

Defendant-Appellee.
_____/

Supreme Court:
125335

Court of Appeals:
244596

Lower Court: WCAC
Docket No: 010173

PLAINTIFF'S SUPPLEMENTAL BRIEF

PROOF OF SERVICE

ZAMLER, MELLEN & SHIFFMAN, P.C.
BY: RICHARD J. EHRLICH (P27348)
Attorneys for Plaintiff-Appellant
23077 Greenfield Road, Suite 557
Southfield Michigan 48075
(248) 557-1155

DARYL ROYAL (P33161)
Attorney Of Counsel to Richard J. Ehrlich,
Attorney for Plaintiff-Appellant
22646 Michigan Avenue
Dearborn, Michigan 48124-2116
(313) 730-0055

TABLE OF CONTENTS

INDEX OF AUTHORITIES CITED

ITEM: PAGE:

Cases

Statutes

Other Authorities

STANDARD OF REVIEW

This Court reviews findings of fact rendered by the WCAC to determine whether they are supported by any evidence in the record, but may reverse the WCAC if it applies erroneous legal reasoning or operates within the wrong legal framework. Const 1963, Art VI, §28; MCL 418.861a(14); Mudel v Great Atlantic & Pacific Tea Co, 462 Mich 691; 614 NW2d 607 (2000); DiBenedetto v West Shore Hospital, 641 Mich 394; 605 NW2d 300 (2000); Oxley v Dep't of Military Affairs, 460 Mich 536; 597 NW2d 89 (1999). In addition, the Court may reverse the WCAC if it misapprehends its administrative appellate role. Mudel, supra, at 709-710.

STATEMENT OF BASIS OF JURISDICTION

This Court's jurisdiction in this matter is drawn from MCL 418.861a(14) and MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED

I

IS PLAINTIFF NO "EMPLOYEE" OF MT. VERNON GROUP HOME, INCORPORATED, UNDER MCL 418.161(1)?

Plaintiff-Appellant answers "YES."

II

DOES THE INCOME PLAINTIFF DERIVED AS OWNER OR EMPLOYEE OF PLAINTIFF'S GROUP HOME BUSINESS CONSTITUTE SOMETHING OTHER THAN WAGES OR REFLECT NO "WAGE EARNING CAPACITY" THAT MAY BE DEDUCTED FROM DEFENDANT'S LIABILITY FOR WORKER'S DISABILITY COMPENSATION BENEFITS?

Plaintiff-Appellant answers "YES."

III

IF ANY DEDUCTIONS ARE APPROPRIATE, SHOULD THEY BE GOVERNED BY MCL 418.371(1), IN THAT PLAINTIFF HAD NO POST-INJURY "EMPLOYMENT," LET ALONE REASONABLE EMPLOYMENT GOVERNED BY MCL 418.301(5)?

Plaintiff-Appellant answers "YES."

IV

ASSUMING ARGUENDO THAT MCL 418.371 (1) APPLIES, DOES PLAINTIFF DEMONSTRATE NO WAGE EARNING CAPACITY "IN THE SAME OR OTHER EMPLOYMENTS"?

Plaintiff-Appellant answers "YES."

V

IN DETERMINING PLAINTIFF'S WAGES OR WAGE EARNING CAPACITY, IF ANY, SHOULD THE AMOUNT BE EQUAL TO THE FAIR MARKET OF THE SERVICES SHE PERFORMED, NOT THE NET PROFIT OF THE BUSINESS?

Plaintiff-Appellant answers "YES."

STATE OF MICHIGAN

IN THE SUPREME COURT

JEANNETTE GORDON,

Plaintiff-Appellant,

vs

HENRY FORD HEALTH SYSTEM,
Self-insured,

Defendant-Appellee.
_____/

Supreme Court:
125335

Court of Appeals:
244596

Lower Court: WCAC
Docket No: 010173

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

(Numbers in parentheses shall refer to the trial transcript pages as follows:

"I" September 6, 2000
"II" September 19, 2000

"PX" shall refer to plaintiff's exhibits, while "DX" shall refer to defendant's exhibits.)

Plaintiff Jeannette Gordon adopts the application for leave to appeal previously filed in this matter. By order dated July 8, 2004, and amended on July 16, 2004, the Court directed its clerk to schedule oral argument on whether to grant the application or take other peremptory action. In addition, the parties were permitted to file supplemental briefs, and directed to include among the issues to be addressed the following:

> "(1) whether plaintiff is an 'employee' of Mt. Vernon Group Home, Inc., under MCL 418.161(1); (2) whether income derived as owner or employee of plaintiff's group home business constitutes 'wages' or reflects 'wage earning capacity' that may be deducted from defendant's liability for worker's disability compensation benefits; (3) whether

> deduction of any wages is governed by MCL 418.301(5) or 418.371(1); (4) assuming arguendo that MCL 418.371(1) applies, whether plaintiff demonstrates wage earning capacity 'in the same or other employments'; and (5) in determining plaintiffs wages or wage earning capacity, if any, whether the amount should be equal to the net profit of the business or whether the amount should be based on the fair market value of the services performed by plaintiff."

Plaintiff now files this supplemental brief towards the end of addressing these issues.

ARGUMENT I

PLAINTIFF IS NOT AN "EMPLOYEE" OF MT. VERNON GROUP HOME, INCORPORATED, UNDER MCL 418.161(1).

In order to be an "employee" within the relevant provisions of MCL 418.161(1), plaintiff must both be "in the service of another, under any contract of hire, express or implied," MCL 418.161(1)(l), and meet the statutory definition of "employee" from MCL 418.161(1)(n). Both conditions must be fulfilled before an individual is deemed to be an "employee." Hoste v Shanty Creek Mgt, Inc, 459 Mich 561, 572-573; 592 NW2d 360 (1999).

As to the first prerequisite, there is no basis for the finding of a contract of hire in this matter. In the first place, there is simply no contract. "In Michigan, the essential elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." Detroit Trust Co v Struggles, 289 Mich 595; 286 NW 844 (1939), quoted with approval in Thomas v Leja, 187 Mich App 418, 422; 468 NW2d 58 (1991). These elements simply do not exist in the instant case.

Plaintiff and the group homes have no mutuality of agreement, mutuality of obligation, or legal consideration underlying any purported contract of hire. Plaintiff could stop doing what she does tomorrow, and she would still receive the profits of the business. More properly, the corporation, of which she is one-half owner, would still receive those profits. In other words, there is no real consideration for plaintiff's continued service, nor is she required to provide that service in order to have a right, ultimately, to the profits as a shareholder of the corporation.

Furthermore, even if there were a contract, there is not a contract of hire. In Hoste, supra, this Court held that:

> "...to satisfy the 'of hire' requirement, compensation must be payment intended as wages, i.e., real, palpable and substantial compensation as would be expected to induce a reasonable person to give up the valuable right of a possible claim against the employer in a tort action and as would be expected to be understood as such by the employer." Hoste, supra, at 576.

The magistrate held below that plaintiff did not receive "real, palpable and substantial compensation" for her efforts. As noted in her prior application, plaintiff believes that this was a finding of fact, which should have been considered conclusive by the Workers' Compensation Appellate Commission ["WCAC"] if supported by competent, material, and substantial evidence. MCL 418.861a(3). Instead, the WCAC improperly recast the inquiry, and handled this as a legal question concerning which it has de novo review powers. Abbey v Campbell, Wyant & Cannon Foundry (On Rem), 194 Mich App 341, 351; 486 NW2d 131 (1992). This, in and of itself, constitutes reversible error.

In any event, absent either any contract at all or a contract of hire specifically, plaintiff cannot be deemed an "employee" pursuant to MCL 418.161(1)(l). Nor is she an "employee" as that term is additionally defined.

The Workers' Disability Compensation Act ["WDCA"] defines "employee" as follows:

> "Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act." MCL 418.161 (1)(n).

This definition in actually one of exclusion, in that the finding of any one of the factors noted in this provision precludes the claimant from being found to be an employee. See, *e.g.*, Amerisure Ins Cos v Time Auto Transportation, Inc, 196 Mich App 569; 493 NW2d 482 (1992).

The analysis of these factors is somewhat clouded in this case, due to the existence of a corporation that actually owns the group home. This fact has been essentially ignored by the WCAC and the Court of Appeals. Both tribunals simply disregarded or pierced the corporate veil, declaring the profits of the business to be plaintiff's as if she was a sole proprietor and not merely the holder of 50% of the stock in the corporation. If this approach is followed through to its logical conclusion, plaintiff simply cannot be an employee.

If plaintiff is to be considered synonymous with the corporation in which she holds a 50% stake, then she both maintains a separate business and is an employer

subject to the Act. As a result, she would be excluded from "employee" status, by definition. MCL 418.161(1)(n).

If plaintiff is not synonymous with the corporation or, to put it another way, the corporate structure is respected, she is not automatically entitled to the profits therefrom[1], and the WCAC and Court of Appeals erred in failing to note that fact. Their eagerness to simply attribute all corporate profits to plaintiff as an individual ignores the legal reality of the situation, further discrediting their analysis.

Furthermore, if plaintiff is effectively considered to be one and the same as the corporation, then she is not "in service to another," also required by the language of MCL 418.161(1)(l) – the "contract of hire" provision. Instead, she would be in service to herself. It is simply inconsistent, not to mention inequitable, to declare plaintiff and the corporation to be one and the same for some purposes, but not others.

Plaintiff is not an "employee" within the meaning of the WDCA.

ARGUMENT II

THE INCOME PLAINTIFF DERIVED AS OWNER OR EMPLOYEE OF PLAINTIFF'S GROUP HOME BUSINESS DOES NOT CONSTITUTE "WAGES" OR REFLECT "WAGE EARNING CAPACITY" THAT MAY BE DEDUCTED FROM DEFENDANT'S LIABILITY FOR WORKER'S DISABILITY COMPENSATION BENEFITS.

As noted in Argument I, above, plaintiff is not an employee of the group home. Nor, in fact, is she technically the "owner" of the group home business. She owns

[1]Even as owner of half the stock in the corporation, plaintiff is not guaranteed to receive even 50% of the annual profits each year. It is possible that such profits would be reinvested in the corporation, used to make new capital purchase, or simply held by the corporation as cash reserves.

half the stock of the corporation that operates the group home. Furthermore, the money she derived as half-owner of the corporate stock does not constitute "wages" or in any way reflect a "wage earning capacity" that may be deducted from defendant's liability to pay benefits in this matter.

"Wages" are commonly understood to be the fruit of an employer-employee relationship, paid based upon the time worked or amount produced. Black's Law Dictionary (West, 7th Ed, 1999) defines "wage" as follows[2]:

> "Payment for labor or services, usu. based on time worked or quantity produced." Id, at 1573.

Similarly, Merriam-Webster's Collegiate Dictionary (Merriam-Webster, Inc, 11th Ed, 2003), defines "wage" thusly:

> "a payment usu. of money for labor or services usu. according to contract and on an hourly, daily or piecework basis -- often used in pl." Id, at 1405.

As already noted, the money plaintiff receives from the corporation is not tied in any way to the time she puts in or amount she produces. Indeed, she would be entitled to the same payment if she did nothing at all. In addition, if there were no profits, she would be entitled to nothing, regardless of the amount of work she performed. This is the antithesis of "wages," as the definitions reprinted above clearly note.

Nor is there any indication on this record that plaintiff has a "wage earning capacity" in the type of tasks she performs for defendant. Plaintiff did not work a regular shift or perform a full day's work for the group homes. She occasionally acted as contact person with the government, hired and fired staff, and at times assisted

---

[2]Reference to a dictionary to discern a statute's plain meaning is entirely acceptable. State ex rel Wayne County Prosecuting Atty v Levenburg, 406 Mich 455, 465-466; 280 NW2d 810 (1979).

with such things as patient transport or grocery buying. However, she had a full staff, including full-time managers, to take care of all other matters, and even to do the things listed above if she chose not to participate.

This is not a "real job." There is absolutely no indication on this record that plaintiff could walk into anyone else's group home and expect to be given a job hiring and firing employees, taking a few phone calls from the county, and doing whatever else she felt like doing and not doing it when she did not feel like it. In other words, there is no showing on this record that there is a substantial job market for the type of tasks plaintiff performed, so as to establish a wage earning capacity. Sington v Chrysler Corp, 467 Mich 144,159; 648 NW2d 624 (2002). It has also been held that a wage earning capacity is demonstrated only when a claimant is engaged in recognized regular employment, with the ordinary conditions of permanency. Wade v General Motors Corp, 199 Mich App 267; 501 NW2d 248 (1993). If plaintiff would not be hired elsewhere to do the type of things she did for the group home corporation, their performance does not evidence a true wage earning capacity.

As a result, once again there is no basis for a credit to defendant for the amounts plaintiff received as income from the corporation. The Act provides only for an offset for post-injury wages, MCL 418.301(5) or MCL 418.361(1), or wage-earning capacity. MCL 418.371(1). Plaintiff has neither.

ARGUMENT III

IF ANY DEDUCTIONS ARE APPROPRIATE, THEY SHOULD BE GOVERNED BY MCL 418.371(1), IN THAT PLAINTIFF HAD NO POST-INJURY "EMPLOYMENT," LET ALONE REASONABLE EMPLOYMENT GOVERNED BY MCL 418.301(5).

MCL 418.301(5), the "reasonable employment" provision of the Workers' Disability Compensation Act, is not applicable in this case. As noted in Argument I, above, plaintiff was not an employee and she had no "employment." As a result, the "reasonable employment" provision simply does not apply to her.

Furthermore, reasonable employment is generally defined as less strenuous work provided to an injured employee to accommodate restrictions necessitated by a job-related injury. Michales v Morton Salt Co, 450 Mich 479, 487; 538 NW2d 11 (1995); Jones v Auto Specialties Mfg Co, 177 Mich App 59, 64; 441 NW2d 1 (1988). There is no evidence of any such accommodations in this matter.

As a consequence, MCL 418.301(5) is simply not applicable to this matter. That leaves MCL 418.371(1). This provision permits a credit when a claimant has a "wage earning capacity." However, and as shall be explained in Argument IV, directly below, plaintiff has demonstrated no such capacity.

ARGUMENT IV

ASSUMING ARGUENDO THAT MCL 418.371 (1) APPLIES, PLAINTIFF DEMONSTRATES NO WAGE EARNING CAPACITY "IN THE SAME OR OTHER EMPLOYMENTS."

As previously noted, the record assembled below includes absolutely no evidence that plaintiff could simply walk into another group home and obtain a position

hiring and firing employees, taking phone calls from the county, and doing whatever else she felt like doing (and not doing it when she did not feel like it). It is illogical to think that any home that already had a full-time manager or managers in place would require anyone to fill such a position.

As a result, there is no indication that plaintiff's performance of stray and intermittent tasks for defendant has demonstrated that she is capable of recognized, regular employment with the ordinary conditions of permanency, sufficient to demonstrate an ongoing wage earning capacity. Wade v General Motors Corp, 199 Mich App 267; 501 NW2d 248 (1993). Furthermore, there has been no showing that there is a substantial job market for the type of tasks plaintiff performed, another indication that she manifests no ongoing wage earning capacity. Sington v Chrysler Corp 467 Mich 144,159; 648 NW2d 624 (2002).

Put simply, if plaintiff could not or would not be hired elsewhere to do the type of things she did for the group home corporation, her performance of those tasks for the group home does not evidence a true wage earning capacity.

ARGUMENT V

IN DETERMINING PLAINTIFF'S WAGES OR WAGE EARNING CAPACITY, IF ANY, THE AMOUNT SHOULD BE EQUAL TO THE FAIR MARKET OF THE SERVICES SHE PERFORMED, NOT THE NET PROFIT OF THE BUSINESS.

In its opinion below, the Court of Appeals majority indicated that defendant could deduct from its liability for compensation the amount of any post-injury wages earned by plaintiff:

> "The WDCA exists to 'compensate a claimant for lost earning capacity caused by a work-related injury, under a comprehensive scheme that balances the employer's and the employee's interests.' Subsection 371(1) instructs, with regard to an employer's responsibility to pay worker's compensation benefits: '[t]he compensation payable, when added to the employee's wage earning capacity after the personal injury in the same or other employments, shall not exceed the employee's average weekly earnings at the time of the injury.' In *Powell v Casco Nelmor Corp*, [406 Mich 332; 279 NW2d 769 (1979),] our Supreme Court held that under subsection 371(1), an employer may set off a disabled employee's wages or wage-earning capacity after the injury. Thus, defendant may deduct from the amount of compensation it must pay to plaintiff any *wages* earned by plaintiff after her disabling injury." Court of Appeals Majority Opinion, at 4-5 (emphasis in the original; footnote omitted).

However, after so stating, the Court went on to permit an offset not of "wages," but instead of "profits," a different thing altogether:

> "It then concluded that because plaintiff's income reflects more than simple passive ownership of the group homes, defendant could offset the net profit from plaintiff's business from the compensation it owed to her. Plaintiff has not demonstrated that the WCAC's interpretation of subsection 371(1) is clearly incorrect. Thus, we defer to

> the WCAC's decision." Court of Appeals Majority Opinion, at 5.[3]

Plaintiff submits that the dissenting opinion more properly understood the proper distinction to be made:

> "It does not follow, however, that all the employee's net profits, whether properly attributed to the employee's labor or to the employee's investment, should be treated as 'wages' subject to set-off. The WCAC may properly determine the value of the employee's service to her company and treat that as wages. This amount will not necessarily equal the net profit from the business, which will likely include items related to the employee's investment in the company, and profit on other employees' labor. I would remand for a determination of the value of plaintiff's service to the corporation, i.e., what the corporation would pay a worker for such services, or, stated differently, what plaintiff would be paid for the services in the marketplace." Court of Appeals Dissenting Opinion, at 1.

This is the only reasonable way to handle the issue, if any offset is appropriate at all.[4]

The WDCA does not provide an employer with credit or an offset for business profits an injured employee might earn. Instead, such credits and offsets are limited to situations involving "wages" or "wage-earning capacity." See, *e.g.*, MCL 418.301(5); MCL 418.371(1). Unless profits and wages are deemed to be one and

---

[3]This analysis is disturbing for a more fundamental reason, that being the Court of Appeals' extreme deference to the WCAC's interpretation of the applicable statute. In reality, the Court reviews questions of law, including matters of statutory construction, de novo. See, *e.g.*, DiBenedetto v West Shore Hospital, 641 Mich 394; 605 NW2d 300 (2000). As a result, it is troubling to see the Court apply a "clearly incorrect" standard to an issue it is supposed to review essentially from scratch. In so doing, the court avoided its obligation to parse the WCAC's interpretation of the statute and render its own determinations in that regard.

[4]As noted above, plaintiff submits it is not.

the same, credit may only be granted for wages (or a wage earning capacity), but not profits.

This is the only reasonable approach. As noted above, plaintiff is not the owner of the group home business. Instead, she is the holder of 50% of the stock in the corporation that operates the business. As a result, it is a fallacy right from the start to attribute all the earnings of the corporation to her as an automatic entitlement. She would receive profits only if the corporation disbursed them, but not if it reinvested them or held them in reserve. Furthermore, even if all the profits were disbursed, plaintiff would not be entitled to all of them, as she is the owner of only a 50% stake in the corporation. To simply assume that she is entitled to the entire net profit of the corporation is as illogical as it is inconsistent with law and fact. This callous disregard of the corporation structure is disturbing.

Furthermore, as the dissenting opinion noted, the fact that plaintiff was more than a passive investor does not automatically transform every dime of income she receives into wages. Instead, as pointed out above, the use of the word "wages" connotes payment for services rendered, based upon either time spent or amount produced. Because plaintiff is not entirely a passive investor does not mean that some of the profits she might receive from the corporation would not be the result of her investment. Certainly, if plaintiff went to another company and offered to perform the very same tasks she performs for the group home business, she would not be compensated for her troubles with the net profit of that company. Instead, she would be paid what the market would bear for someone performing the tasks she performed.

If plaintiff actually obtained such a position, she would be earning wages, and an offset would take place accordingly. If there was any showing whatsoever of a real or substantial market for such jobs, plaintiff might be said to have the capacity to earn wages performing these tasks. However, again, the capacity would be only what the market would bear for the tasks performed, or as this Court put it, the "fair market value of the services performed by plaintiff," not the net profit of any outfit plaintiff might choose to work for. That being so, "wages" or "wage earning capacity" may not be equated with net corporate profits.

Instead, if either wages or a wage earning capacity existed in this case, only the value of plaintiff's services would serve as an offset. Any other finding would unfairly penalize plaintiff for opening her own business, instead of simply taking a job elsewhere.[5]

This result is also consistent with the following language, from the subsection of MCL 418.371 having to do with the establishment of the claimant's average weekly wage:

> "If the hourly earning of the employee cannot be ascertained, or if the pay has not been designated for the work required, the wage, for the purpose of calculating compensation, shall be taken to be the usual wage for similar services if the services are rendered by paid employees." MCL 418.371(5).

This is obviously a "fair market value" approach. If any offset is appropriate, something plaintiff certainly does not concede, the language of this provision is

---

[5]Of course, the record in this matter in no way suggests that plaintiff could have or would have been hired if she had looked for this type of work, so that neither wages nor a wage earning capacity have been shown to exist here.

instructive of the legislature's intentions in attributing a wage where none has been designated.

CONCLUSION

As demonstrated above, there is simply no basis for a credit for any profit plaintiff might receive from the corporation that owns the group home, in which she is a 50% shareholder. She is not an "employee" of that corporation, and any amounts she receives would not represent wages. Nor is there a showing that she is capable of obtaining a job elsewhere doing the same sort of work, which might suggest a wage earning capacity in such work. Even if some sort of offset would be permitted, it would have to be based upon the fair market value of the services she provided, and not the entire profit of a corporation of which she is only half-owner, which might not even distribute those profits to its shareholders.

RELIEF

WHEREFORE Plaintiff-Appellant JEANNETTE GORDON respectfully requests that this Honorable Supreme Court either grant her application for leave to appeal, or grant peremptory relief pursuant to MCR 7.302(G)(1). More specifically, the Court should reverse that portion of the opinions of the WCAC and Court of Appeals granting defendant any offset or credit for amounts plaintiff realizes from her ownership interest in the group home business. At the very least, the offset should be limited to an amount representing the fair market value of the services she provides. Plaintiff further requests any other relief to which she may be entitled.

Respectfully submitted,

DARYL ROYAL (P33161)
Attorney Of Counsel to Richard J. Ehrlich,
Attorney for Plaintiff-Appellant
22646 Michigan Avenue
Dearborn, Michigan 48124-2116
(313) 730-0055

ZAMLER, MELLEN & SHIFFMAN, P.C.
BY: RICHARD J. EHRLICH (P27348)
Attorneys for Plaintiff-Appellant
23077 Greenfield Road, Suite 557
Southfield Michigan 48075
(248) 557-1155

Dated: September 2, 2004

STATE OF MICHIGAN

IN THE SUPREME COURT

JEANNETTE GORDON,

Plaintiff-Appellant,

vs

HENRY FORD HEALTH SYSTEM,
Self-insured,

Defendant-Appellee.
_____/

Supreme Court:
125335

Court of Appeals:
244596

Lower Court: WCAC
Docket No: 010173

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

PROOF OF SERVICE

DARYL ROYAL, being first duly sworn, deposes and says that on the 2nd day of September, 2004, he deposited in the United States Mail at Dearborn, Michigan, a copy of Plaintiff's Supplemental Brief, addressed to:

Thomas Fleury
John Rabaut
Barbara A. Rohrer
Keller, Thoma, Schwarze, Schwarze,
DuBay & Katz, P.C.
Attorney for Defendant
440 East Congress, 5th Floor
Detroit, Michigan 48226-2917

with sufficient postage affixed.

DARYL ROYAL

Subscribed to and sworn before me, a Notary Public, this 2nd day of September, 2004.

Mary Irene Maslowski

MARY IRENE MASLOWSKI
NOTARY PUBLIC WAYNE CO., MI
MY COMMISSION EXPIRES Apr 29, 2008